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No. 90-1947

In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

v.

CITY OF ESCONDIDO,

Respondent.

On Writ Of Certiorari To The Fourth Appellate District, Division One Court of Appeal For The State Of California

BRIEF AMICUS CURIAE OF MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Manufactured Housing Educational Trust of Santa Clara County is a nonprofit mutual benefit corporation organized under the laws of the State of California to improve and promote the general interest and welfare of the manufactured housing industry in Santa Clara County, California. Members of the trust have a direct interest in the mobilehome industry in Santa Clara

County and a particular interest in the resolution of the issue before the Court in this case.

San Jose is the largest city in Santa Clara County. In 1986 San Jose adopted a mobilehome rent ordinance which included a prohibition on rent increases upon the in-place transfer of mobilehomes like the provision before this Court in the Escondido ordinance. In 1989, in response to the decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), the ordinance was amended to repeal this vacancy control provision. On September 10, 1991, in specific recognition of the decisions of California Courts of Appeal refusing to follow *Hall* and of the pending petition for certiorari in this case, San Jose amended its ordinance to limit rent increases upon the in-place transfer of mobilehomes, but suspended the provision until the city attorney certifies that it is legally permissible to impose vacancy control on mobilehome space rents. The current ordinance provides for an adjustment of rents to provide at least a partial rebate of rents paid prior to the adoption by the city of a resolution terminating the suspension of the "vacancy decontrol" provision. Members of the trust are concerned with the effect on the vitality of the mobilehome industry of the type of rent control provision at issue in this case and possess a direct interest in the effect of the decision of this Court on the ordinance in San Jose. Written consent of the parties has been received to file this brief as amicus curiae in support of petitioners. The letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The provision of the Escondido Mobilehome Rent Protection Ordinance that transfers a right to collect rent from the mobilehome park owner to the mobilehome owner deprives the park owner of a property interest protected by the Due Process Clause of the Fourteenth Amendment.

The circumstances of this case suggest that the ordinance should not be granted total deference by reviewing courts and should be reviewed to ensure that the transfer of a property interest challenged in this case substantially advances a legitimate government purpose. A strong potential for arbitrary action is indicated by the facts that the ordinance was adopted by initiative after being rejected by the city council, that the legislative body of the city may not amend the ordinance to correct unjust results, and that the ordinance contains no identification of legitimate purposes and states no rational basis for the policy choice establishing unequal treatment between two persons allowed to collect rent on the same property.

The ordinance violates the Due Process Clause because there is no real and substantial relation between the challenged provision and the purposes of the ordinance as argued to the Court by counsel or as reasonably hypothecated from the circumstances.

ARGUMENT

I

THE RIGHT TO COLLECT RENT IS A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Escondido's Mobilehome Rent Protection Ordinance has severed from the rights inhering in the ownership of a mobilehome park the right to collect that portion of the normal market rent that is above the controlled rent level set by the board. That right to collect rent is, in effect, granted to the mobilehome owner who is occupying the space in the park. It is this transfer of the right to collect rent from park owner to mobilehome owner that violates the park owner's due process rights.

"The Fourteenth Amendment's protection of 'property' . . . has been read broadly to extend . . . to 'any significant property interest' . . . . " *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972), quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The property interest in the right to collect rent exists both as an incident of ownership of the real property and as personal property in an obligation of contract created by the lease. For real property such as mobilehome parks the "property" for purposes of the Fourteenth Amendment is defined by the ownership interests that arise in relation to the physical property itself. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). "The constitutional provision is addressed to every sort of interest [in relation to real property] the citizen may possess." *Id.* Among the protected interests in property is the right to keep "the value of the use" of the

property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). This Court has recognized that "the right of property in land" is affected by government actions that regulate "the amount of rent that may be charged." *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922).

The right to collect rents under the lease is also a protected property interest. "Valid contracts are property. . . . " *Lynch v. United States*, 292 U.S. 571, 579 (1934). Under California law "[t]here may be ownership . . . of all obligations . . . " (Cal. Civ. Code § 655 (West's 1982)) and the right to collect rent under a valid lease is a "thing in action" which is recognized as personal property. Cal. Civ. Code § 953 (West's 1982).

II

PLAINTIFFS' PLEADINGS STATE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY DEMONSTRATING THAT THERE IS NO REASONABLE NEXUS BETWEEN THE RENT CONTROL PURPOSE OF ESCONDIDO'S ORDINANCE AND THE MEANS EMPLOYED THAT ALLOW THE OWNER OF THE MOBILEHOME TO COLLECT RENT IN THE FORM OF A PREMIUM PAYMENT AT THE TIME OF SALE OF THE MOBILEHOME

This Court has not established a set formula for determining when a municipal ordinance violates the requirement of the Due Process Clause of the Fourteenth Amendment " 'that the means selected shall have a real

and substantial relation to the objectives sought to be attained.' " *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980), quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934). While the question remains the same in different cases the level of deference accorded the municipality's judgments and the intensity of the Court's review vary according to the degree to which the circumstances suggest the possibility of arbitrary action. In this case the level of review applied by the California courts falls far short of the requirements of due process.

This case comes to this Court on the pleadings having been dismissed after the trial court sustained the city's demurrer without leave to amend and dismissed the case. The Court of Appeal affirmed without directly addressing the due process issue. The Court of Appeal only noted that "[n]o one can dispute that Escondido's rent control ordinance . . . effects a transfer of value from landlords to tenants. The critical question is whether such a transfer can be justified by a rational governmental purpose, i.e., are the controlled rents fair and reasonable." It decided that since "plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents" it would assume that the rents were fair and no constitutional violation could result. Petition for Certiorari at A-13-14. In concluding its opinion, the Court of Appeal explained its position that "the decision whether to use rent control as a took [*sic*] to correct imperfections in the market system is a political issue for legislative bodies and not a question of constitutional law for the courts." Petition for Certiorari at A-28.

Thus, the decision of the Court of Appeal is a broad, facial ruling that due process is satisfied by an ordinance that includes as one of its provisions control of rent levels as long as the rents are "fair and reasonable." That conclusion merely begs the question presented by the allegations in the complaint. "Though no issue is raised here that the rent paid by the tenant is insufficient, that fact does not end the inquiry." *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J., dissenting). Petitioners should have been allowed to prove that the transfer of the property interest in collection of rent had no real and substantial relation to the objectives of the ordinance. As demonstrated by this case, an ordinance that otherwise serves legitimate state interests may contain specific provisions that have no rational relationship to those objectives.

A. The Total Deference Applied by the Court of Appeal Is Inappropriate on the Facts of This Case

While this Court has certainly counseled that the Due Process Clause allows great deference to the decisions of legislative bodies in economic matters in general and in rent control in particular, *see, e.g., Pennell v. City of San Jose*, 485 U.S. 1 (1988), it has never countenanced a total abrogation of judicial responsibilities. Moreover, a general ordinance that undoubtedly has a legitimate public purpose can nonetheless violate the Due Process Clause if individual provisions of the ordinance are not rationally related to that purpose. *See, e.g., Moore v. East Cleveland*, 431 U.S. 494 (1977).

In *Moore* this Court accepted that it had already held in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), that "limits on the types of groups that could occupy a single dwelling unit . . . bore a rational relationship to permissible state objectives." *Moore*, 431 U.S. at 498. Nonetheless, this Court examined the specific provisions of the East Cleveland ordinance and determined that the city's particular means of pursuing those objectives violated the Due Process Clause. *Id.* at 500-06.

In *Texaco v. Short*, 454 U.S. 516 (1982), this Court examined a state statute which, like the ordinance in this case, would cause the loss of a property interest by one group of persons that would then inure to another group of persons. Before upholding the statute against a due process challenge the Court was careful to examine "[e]ach of the actions required by the State" to determine if each "furthers a legitimate state goal." *Id.* at 529. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court expressly noted that different aspects of the same legislation must be examined separately under a due process analysis and that the justifications for one may not suffice for another. *Id.* at 17.

A due process analysis must recognize "that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

Even the most deferential standard of review has not been treated as an abdication of the judicial role. Although the Court may cast a casual glance, it does not

turn a blind eye. Indeed, this Court has not hesitated to hold municipalities to account when the circumstances of the case suggest a possibility of arbitrary governmental conduct. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Moore, supra.*

The constitutional challenge presented in this case is not a broad attack on the legitimacy of "price control" as a legislative purpose. It is narrowly focused on the provision of the Escondido ordinance that transfers the ability to collect a portion of the rent for the space in the mobilehome park from the owner of the park to the owner of the mobilehome who is in possession of the space and who is leaving the park and selling the mobilehome. This characteristic distinguishes this case from price control in general and from the other rent control statutes previously reviewed by this Court. *See Pennell v. City of San Jose, supra; Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Porter v. Lee*, 328 U.S. 246 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *Edgar A. Levy Leasing Co. v. Siegel, supra; Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

As a minimum the courts below were obligated to determine the specific permissible objectives for Escondido's rent protection ordinance and to identify that the specific provision of this ordinance which plaintiffs challenge has " 'a real and substantial relation to the objective sought to be attained.' " *Pruneyard*, 447 U.S. at 85, quoting *Nebbia v. New York*, 291 U.S. at 525. By casually dismissing both the claim and the complaint the courts below failed in their judicial responsibility to measure the challenged

provision of the ordinance against the appropriate constitutional standards.

The indicia of potential inappropriate governmental conduct are strong enough in this case to call upon this Court to take a clear look at the rationality of the means employed to achieve the asserted ends of the ordinance.

B. The Transfer by the Escondido Ordinance of a Significant Property Interest Implicates Fundamental Individual Rights and Suggests That Total Deference to the Municipal Decision Is Inappropriate

The test set forth in *Nebbia, supra*, requires not only that the challenged ordinance serve "a proper legislative purpose" (291 U.S. at 537) but also "that the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525. Although as a general proposition "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular . . . " (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)), the Court has not hesitated in other contexts to question the relationship between means and ends when the means employed affect significant individual interests and where potentially inappropriate purposes were identified. Without resorting to "strict scrutiny" the Court has carefully reviewed the relationship between objectives chosen and the means employed in a wide variety of contexts. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (significant property interests);

Cleburne v. Cleburne Living Center, supra (mental retardation); *Williams v. Vermont*, 472 U.S. 14 (1985) (preferences for in state residents); *Moore v. East Cleveland, supra* (family relationships); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distribution of contraceptives); and *Reed v. Reed*, 404 U.S. 71 (1971) (male preferences).

The teaching of these cases is that the substantial deference accorded the legislative selection of ends does not necessarily extend to the selection of means in circumstances that suggest that important interests of adversely affected individuals may be subjected to arbitrary or unreasonable treatment.

The more careful review demonstrated by these cases does not suggest a return to the judicial intervention in legislative prerogatives characterized by the *Lochner* era. These cases do not second-guess the legislative policy choices over what areas or subjects require regulation. They do not employ "strict scrutiny" nor do they demand "compelling governmental interests" to justify the decision to regulate. The review employed in these cases is of limited scope directed only to ensure that when important individual rights are affected the means employed bear a substantial relation to the legislative choice of purposes.

The nature of the review is set by the context of the case with attention focused on the nexus between the means employed and the ends sought to be achieved. "Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means

. . . must be reasonably related to the end. . . . " *Perez v. Brownell*, 356 U.S. 44, 58 (1958), overruled on other grounds, *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Where important individual rights are involved this nexus must be substantial enough to ensure that under the circumstances a few persons are not being required to bear disproportionate burdens for minor improvements in the public condition. The due process requirement that the law not be arbitrary or irrational in its effect means that the burdens imposed must substantially advance a legitimate state purpose.

At its core, the evaluation of this nexus is a balancing test that recognizes that the Due Process Clause in its substantive context as well as in its procedural context is a mandate for fairness. Legislative bodies exercising their police power must be allowed clear fields and broad horizons to protect and promote the public welfare in our modern society. Yet it is fundamental that the very breadth and depth of the reach of the police power results in continuous collision with the expectations and rights of individuals. For the courts, the protection of individual rights is no less important than the protection of the legislative authority. As the arbiter of this conflict the courts must of necessity balance one against the other. When fundamental individual rights are at stake this review must not be based on unquestioning deference, but on reasoned judgments on whether the regulation of the individual rights in each case substantially advances a legitimate governmental purpose.

Given the significant individual property right at stake in the transfer by the Escondido ordinance of the right to collect rent from the owner of the mobilehome

park to the owner of the mobilehome, the courts below failed to exercise properly their responsibilities under the Due Process Clause to test the adequacy of the nexus between the transfer of the property interest and the rent control objectives of the ordinance.

C. Consideration of Other Factors Suggests That Total Deference Not Be Granted the City in This Case

In addition to the loss of important individual rights discussed above, other factors present in this case suggest the effects on the mobilehome park owners may be arbitrary and unreasonable. These factors militate against the granting of total deference to the city.

The Escondido Rent Protection Ordinance is not a product of the deliberation of a legislative body. It was adopted by a vote of the city's electors on an initiative measure. The legislative body of a local government can be presumed to act in a constitutional manner and to set as the legislative objective the protection of the public welfare. Voters on the other hand act in their individual self-interest. This Court has recognized that private citizens cannot be presumed to be acting in the public interest even when officially designated to make a policy choice. "They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily. . . . " *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928).

On the other hand "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). In

this case the normal deference to the "legislature" would go to the city council and that deference works against any presumption in favor of the ordinance. The city council for Escondido was urged to adopt a mobilehome rent control ordinance and refused to do so just prior to this initiative going on the ballot.[1] To the extent that legislative judgment is properly recognized in this case, it suggests that the initiative ordinance was not necessary to advance a legitimate government purpose.

One of the primary rationales for the principle of deference to legislative enactments being reviewed under the Due Process Clause is the recognition by the courts that matters of a legislative nature should be resolved by legislative action not by judicial intervention. "[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . ." *Berman v. Parker*, 348 U.S. at 26. The courts hesitate to address actions that are unwise, inappropriate, or even wrong, recognizing that corrections and needed adjustments are appropriately attained through the legislative process. Corrections to the Escondido Rent Protection Ordinance, however, cannot be enacted in the normal legislative manner. Under California law, a city ordinance adopted by the initiative process may not be amended by the legislative body unless provision for such amendment is made in the original ordinance. Cal. Elections Code § 4013 (West's 1977). This ordinance does not provide for amendment by the city council. No matter how oppressive the effects of the ordinance may be on park owners

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[1] *See* Minutes of the Escondido City Council meeting for July 15, 1987, reproduced in the Appendix to this brief.

they may turn for relief from its terms only to a popular election where they will face an oppugnant response from the large body of renters who outnumber them approximately 235 to 1 at the polls.[2] The initiative process in this case presents great potential for the majority to take unfair advantage of a minority. Due process requires that the courts look closely enough at this ordinance to ensure that the lack of an effective legislative process to correct abuse has not resulted in the infringement of the rights of individuals.

The form of the Escondido Rent Protection Ordinance also makes it particularly inappropriate to receive substantial deference. It contains no findings or statements of purpose related to the public interest. Voters were not presented with problems affecting the public welfare and were not given an opportunity to evaluate the reasonableness of the measure proposed in light of the nature of the problem being addressed. The ballot measure on its face simply asked a largely disinterested electorate to grant a special economic benefit to a special group of people at no cost to the voters at large. Such a circumstance calls out for careful consideration of whether the means employed substantially advance a

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[2] There are 37 mobilehome parks in the City of Escondido and approximately 4,500 spaces in those parks. Eighteen of the park owners are not residents of the city. At the ballot box for city elections, those who rent spaces in parks outmatch those who own the parks by approximately 235 to 1. Letters to the editor during the campaign for the initiative referred to park owners as "millionaires," "liars," "robbers," and "gang of wealthy park owners" who brought in a "costly hired gun," a "big gun attorney," and a "hired political assassin."

legitimate public purpose as opposed to the private interests of the initiative's sponsors.

The lack of any legislative pronouncement on the purposes of the ordinance places an extra burden on the reviewing courts to ensure the protection of individual rights under the Due Process Clause. The Court faces two very unreliable alternatives as its only sources for determining the purposes of the enactment. It may accept the post hoc rationalizations of Escondido's counsel on the purposes for the ordinance, or the Court may hypothecate its own ideas on what objectives might have motivated the voters of Escondido. Either approach is less than satisfactory for the protection of the park owners' rights.

In other contexts this Court has frequently counseled against the uncritical use of post hoc rationalizations of counsel by a reviewing court. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Moreover, while a court may be competent to recognize legislative facts and to impute with some degree of accuracy the objectives of a legislative body, an attempt to define the motivations of voters in a public election is a chancy affair at best. The employment of either of these approaches should call for attention to the facts of the case beyond total deference. The Court must take special care to ensure that the objectives attributed to Escondido's initiative ordinance by either of these two methods are sufficiently clear and obvious from the circumstances that it is more probable than not that they were on the mind of the voters at the time of the election.

Yet another concern with the Escondido ordinance arises from the arbitrary distinction between the two parties who are allowed to collect rent for the space in the park. By transferring to the owner of the mobilehome a possessory interest in the space in the park, the city has created in effect a second owner who is in a position to collect rent.[3] The rent control provision, however, restricts only the rent collection by the park owner. Section 3. It does not restrict rent collected from a prospective purchaser by the seller of a mobilehome in the park. This disparate treatment of the two parties who are similarly situated with regard to the collection of rent suggests arbitrary action. While the choice among alternatives, all of which are rational and fair, is normally left to the legislative body, the chosen scheme must approach the problem rationally. *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 477-78 (1985). Due process requires that the inconsistency in the application of the rent restriction to the two parties allowed to collect rents must be reviewed to determine whether on the facts of the case the apparently arbitrary choice substantially advances a legitimate purpose of the ordinance.

The substantial deference normally afforded enactments of a legislative body for review under the Due Process Clause is not appropriate in this case where the Escondido city council did not adopt the ordinance and

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[3] In *Hall v. City of Santa Barbara*, 833 F.2d 1270, the Circuit Court referred to this situation as creating "complementary estates in the same land." *Id.* at 1279.

cannot correct its shortcomings and where the rent protection ordinance on its face does not set forth a legitimate government purpose and displays an arbitrary choice to impose disparate treatment on similarly situated parties.

D. The Provision of the Escondido Mobilehome Rent Protection Ordinance That Transfers a Property Interest in the Ability To Collect Rent from the Park Owner to the Mobilehome Owner Does Not Advance Any Legitimate Purpose of the Ordinance

As discussed above, determining the purposes of Escondido's ordinance is an initial challenge requiring careful judicial deliberation. The ordinance itself is silent and, since no trial was allowed, there is no other factual documentation in the record to assist in this most important task. The lack of any reliable indication of the proper purposes for the ordinance suggests that it was error for the courts below to affirm summarily the constitutionality of the ordinance and dismiss the case.

Although this Court gives substantial deference to the selection of purposes by a legislative body, just any purpose is not enough. Without resorting to the "compelling governmental interest" analysis, this Court has been willing to invalidate statutes that pursue apparently inappropriate objectives. For example, a state may not "discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985) (quoting *Allied Stores of Ohio, Inc.*

v. Bowers, 358 U.S. 522, 533 (1959)). In this case there is a substantial possibility of a similar unacceptable purpose in that the voters intended to favor the interests of mobilehome owners, all of whom are residents of the city, by burdening park owners, many of whom were known not to be residents.[4]

The purposes asserted by counsel for the city to defend the ordinance before this Court are limited:

> "The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the home owner's investments, while also providing park owners with a just and reasonable return on the park owner's investment." Respondent's brief in opposition at 27.

In this statement it is possible to discern two express objectives and one possibly implied objective.[5] The expressed objectives are "providing park owners with a just and reasonable return" and "protecting mobilehome owners from unreasonable space rental increases." It is possible that the language "protecting home owner's

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[4] "Wake Up, Escondido," letter to the Editor, *Escondido Times Advocate*, May 8, 1988, by Rudy Sweet, stated: "A high percentage of the park owners are from out of taown [*sic*] and guess what they do with their huge profits."

[5] As argued in II.C above, the Court should be reluctant to hypothecate possible purposes for an initiative ordinance such as this.

investments" is intended to imply an additional purpose to provide home owners assurance of an enhanced ability to sell their mobilehomes.

As discussed above this statement by counsel of the purposes served by the ordinance is a post hoc rationalization, an unreliable source for the true purposes of the initiative ordinance. With all due respect for counsel's attempt to dress up the ordinance with a finery that gives it an even-handed appearance, it is hardly conceivable that the advocates of the ordinance had any intention of assuring park owners of a just and reasonable return on their investment. The ordinance itself indicates the contrary. The ordinance commands the board to "approve such rent increase as it determines to be just, fair and reasonable." Section 4(g). It says the *increase* shall be just, fair, and reasonable, presumably to tenants as well as to park owners. It does not say that the owners' *return* shall be just and reasonable. The factors the board is to consider in setting rents do not refer to a just and reasonable return on investment. *See* Section 4(g). In fact the exact opposite is true. The board is prohibited from allowing *any* return on investment for capital improvements. The park owner is limited to recovering "the cost of the capital improvement, including interest." Section 4(h). Moreover, this asserted purpose cannot justify the provision of the ordinance that is challenged in this case. The transfer of the right to collect a portion of the rent from the park owner to the mobilehome owner has no rational relation to, and in fact works against, an objective to assure the park owner a fair and reasonable return.

The collection by the mobilehome owner of a portion of the rent above the controlled level also works against

the express purpose of limiting space rental increases. It serves no legitimate purpose as to existing home owners whose rent levels were controlled during their occupancy by other provisions of the ordinance. The ordinance grants selling mobilehome owners a windfall extracted from future mobilehome owners. For future homeowners the payment of advance rent in the form of a premium included in the purchase price works directly contrary to any purpose to limit space rental increases. For them it is, in effect, a charge of an uncontrolled increment of rent above the controlled rent levels.

Since the transfer of the property interest has no rational relationship to the purposes expressed by counsel, the Court is left to imply from the assertions of counsel or to hypothecate on its own that the windfall to the mobilehome owner is justified by the intent to protect the home owner's ability to sell the mobilehome. The argument appears to be that if park owners are allowed to raise rents when the home is sold they will raise rents far higher than would the owner of the mobilehome (through the premium payment) because the park owner would want to stop the transfer of ownership. This is the type of consideration that led the Ninth Circuit to find that a similar provision in the City of Los Angeles' mobilehome rent stabilization ordinance did further a legitimate government interest. *Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___ (9th Cir. 1991), 91 Daily Journal D.A.R. 13599-602 (Nov. 5, 1991).

Despite the unexplained conclusion by the Ninth Circuit, the relationship between the windfall granted the mobilehome owner and the need to protect the investment in the mobilehome is hard to isolate and difficult to

define. It is counterintuitive to suggest that allowing the park owner to raise rents will result in attempts to interfere with the transfer of ownership of mobilehomes. The ability to increase rents at the time of sale would be a strong economic incentive for the park owner to *assist* in the transfer. On the other hand, without the economic incentive of a rent increase, the uncertainties and burdens of adapting to a new tenant (whom the park owner cannot select) provide incentives for the park owner to resist such transfers. Common sense dictates that the provision being challenged does nothing to encourage park owners to assist the transfers and could work to promote resistance by park owners to mobilehome sales.

At the very least the improbability of such conduct requires that the petitioners be allowed to make their case in court that no facts exist to support this asserted objective.

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) (citation omitted).

It is important to recognize that the asserted problem, if it exists at all, has a very limited possible scope. The problem that is supposedly being addressed is the raising of the space rental at the time the mobilehome is for sale. However, the increase of the mobilehome price

by the home owner in order to capture the rental value will have exactly the same effect as an increase by the park owner. It must be accepted as true from the pleadings that the mobilehome owners themselves will exercise their new property interest and raise the effective rents at the time of transfer. As noted by the Ninth Circuit in *Azul, supra*, these advanced rental payment charges by mobilehome owners are very substantial, ranging as high as $72,000 with an average figure for the Los Angeles area of $20,880. 91 Daily Journal D.A.R. at 13599, 13601. These figures represent the present value of *very significant rent increases*. $72,000 represents a $600 per month rent increase over 10 years without discounting for present value (or put another way, without escalation for future inflation).

The only rational presumption is that both parties will be inclined to collect as much rent as the market will allow and that the limits imposed by the rental market will stop either one from collecting a much higher rent than the other. There is no economic basis for an assumption that the increase by the park owner would have a different effect on the willingness to buy than would the increase by the mobilehome owner. The market effect on the knowledgeable buyer should be the same.

A problem can only be created out of this apparently neutral situation by presuming that park owners will act contrary to their own economic interests and that they are, as a class, so vindictive, vicious, or pernicious that they will turn down a clear economic advantage to them if the mobilehome sells in order to inflict harm on the mobilehome owner by demanding rent so far above market levels as to block a sale. This is too much to presume

to be the ordinary state of affairs. Without legislative findings or a record demonstrating that such improbable conduct is likely, the probability that this problem exists is remote and highly speculative.

To solve a hypothetical and improbable concern, the city has adopted an ordinance that causes a major intrusion on the protected property rights of the park owners and creates a major, unjustified economic windfall for the mobilehome owners. The provision challenged in this case works against the two governmental purposes expressly advocated by the city to justify the ordinance. Without hypothecating the existence of a problem that is contrary to normal human behavior, the provision of Escondido's ordinance that bestows a windfall on mobilehome owners at the expense of park owners has no rational relationship to any legitimate governmental purpose.

CONCLUSION

It was clear error for the California courts to dismiss plaintiffs' complaints. On the facts alleged the provision of the Escondido Mobilehome Rent Protection Ordinance that transfers the right to collect rent from the park owner to the mobilehome owner does not "have a real and substantial relation to the objectives" of the ordinance. This Court should reverse the decision of the California Court of Appeal and allow plaintiffs to prove their claim

that the ordinance as applied to them violates the Due Process Clause of the Fourteenth Amendment.

DATED: November, 1991.

Respectfully submitted,

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APPENDIX

EXCERPTS OF THE
MINUTES OF THE REGULAR MEETING
OF THE CITY COUNCIL, WEDNESDAY
JULY 15, 1987

CONSIDERATION OF MOBILE HOME RENT CONTROL

Mayor Rady opened the public hearing and asked if anyone would like to speak regarding this matter.

Phyllis Winters, Casa de Amigos Mobilehome Park, member of EMPAC, suggested the City Council follow the direction of Oceanside and San Marcos which have adopted rent control ordinances that are legal with the State of California.

Mark O'Brian, speaking for his grandmother who lives in the Valley Parkway Mobilehome Park, urged the Council to implement some type of rent control for mobilehome residents.

C. D. Douglass, 2300 E. Valley Parkway, thanked everyone who has been involved in this issue since the beginning in 1983. He said they still feel that a housing authority would be appropriate with explicit rules and penalties for violations.

Don Olmstead, 809 Olive, Vista, spokesman for EMPAC (Escondido Mobilehome Action Committee) reviewed the letter from EMPAC and spoke in support of the proposed ordinance with the changes as recommended in their letter.

Robert Caldren, attorney with Hard, King & Caldren, Santa Ana, representing the Escondido Mobilehome Park Owners' Association, spoke against rent control. He said

the park owners do not like the proposed ordinance and the mobilehome residents are not entirely satisfied with the proposal before the City Council. He referred to several court opinions involving rent control (i.e. Sonoma Country [*sic*] Board of Supervisors, City of Fresno and Palm Desert.) He felt that proposed ordinance contained problems and potential liability.

Councilmember Thurston read a letter from Dan Johnston, owner of Mountain Shadows Mobilehome Park, in support of the proposed ordinance.

Harold Greenbalm, chairman of the North County Slow Growth Alliance, Leucadia, spoke regarding the high cost of housing in North County. He said he was extremely concerned about the senior citizens and urged the Council to show compassion towards the senior citizens.

Councilmember Cowan indicated the City Council has been told there are "horror" stories concerning rent increases in mobilehome parks; however, no one has come forward to speak of any specific incidents.

Nat Savit, 1301 S. Hale Avenue, complained about the stench from the Hale Avenue Sewer Treatment Plant.

Mary Huff, Mountain Shadows Mobilehome Park, referred to Mr. Johnston's letter read by Councilmember Thurston and said that Mr. Johnston has his park up for sale.

Bertha Hickman, Escondido Terrace Mobilehome Park, said she signed a 10 year lease to avoid monthly rent increases.

Frank Rhinehart, Space 86, Escondido Terrace Mobilehome Park, spoke regarding the lease at his

mobilehome park indicating there is a minimum increase of 5% regardless of the CPI, plus utilities.

Councilmember Harmon indicated one of the things EMPAC has been working on doing is to try and establish an organized clearing house in the City so concerns and problems can be identified and documented before they are brought to the City Council.

Don Olmstead referred to a letter from Swanson & Dowgall, attorneys at law, dated January, 1987, (copy on file in the City Clerk's office) referring to changes in the Mobilehome Residency Law and Other New Laws. He said this letter was given to all mobilehome park owners.

Buz Dupont, 312 N. Sierra Avenue, Solana Beach, part owner of Vista Verde Mobilehome Park, said he has never seen the letter referred to by Mr. Olmstead. He referred to Doris Thurston's "white paper" from last December that specifically addressed the problems faced by the "needy" elderly. A plan has been developed by park owners to assist "needy" elderly. He did not feel that rent control was the answer to helping the "needy" elderly.

Rudell Sweet, 1380 Oak Hill Drive, spoke regarding the signing of a lease with her mobilehome park.

Mark O'Brien spoke further regarding rent increases from 1970 to the present as they relate to his grandmother. He said originally the utilities were included in her rent, but now they are paid separately. He felt rent control in mobilehome parks should have been implemented years ago.

A resident of Escondido Terrace reminded Council that mobilehome park residents are only renting a space to

park their mobilehomes on. They are not renting the dwelling as they would be with an apartment.

Iris McClure said she has lived at Carefree Mobilehome Park, 212 N. Citrus Avenue from 1962 to the present. She spoke regarding rents during this time.

Ann Anderson, Carefree Mobilehome Park, said she lives on Social Security and pays $287 a month plus utilities for a total of $304 each month.

Chuck Hughes, Western Mobilehome Association, 2605 Camino del Rio, San Diego, felt the park owners and residents were talking at each other and not to each other. He distributed an outline entitled "Organizational Structure of a Non-Profit Organization to Implement the Cooperative Solutions for the Yucaipa Mobilehome Park Residents" and encouraged Council to look into this type of approach. (Copy on file in the City Clerk's office.)

All persons having been heard who wished to be heard, the Mayor closed the public portion of the hearing at this time.

Councilmember Harmon encouraged the Council to adopt the proposed ordinance with the changes recommended by EMPAC. Council discussed the issue of rent control verses rent stabilization and the fact the proposed ordinance is not favored by either the homeowners or the park owners.

Moved by Councilmember Harmon the City Council adopt the proposed ordinance drafted by the five member businessmen's committee with the additions and modifications provided by the EMPAC committee contained in the "blue" binder. Ayes: Harmon and Thurston.

Notes: Best, Cowan and Rady. Absent: None. Motion failed.

Moved by Councilmember Cowan the City Council direct staff to coordinate the examination of the proposal submitted by Chuck Hughes and return to Council with a report in 30 days. Motion carried unanimously.